Supreme Court, U.S.
FILED

(1)

97 798 NOV 12 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

Art Osborne

Petitioner

v.

United States of America

Respondent

Petition for a Writ of Certiorari to the
United states Court of Appeals
For the Eleventh Circuit

Petition for a writ of Certiorari

Art Osborne
Petitioner
3650 Denewood Court
Columbus, GA 31909
(706) 563-3674

84 pp

QUESTION PRESENTED

A government contract was closed in reprisal for Petitioner's challenge of a discriminatory paragraph contained within the contract. The government attorney who developed the motion to dismiss Petitioner's complaint devised a fraudulent complaint and misrepresented Petitioner's grievance to the District Court.

When a private citizen/independent contractor petitions the Government for a redress of grievances and a District Court sustains a motion for summary judgment that is based upon a bogus grievance, unrelated to the grievance of the Petitioner, does that satisfy the guaranteed Constitutional right "to petition the Government for a redress of grievances"?

INTERESTED PERSONS

Phyllis A. Kravitch, U.S. Senior Circuit Judge

Susan H. Black, U.S. Circuit Judge

Emmett R. Cox, U.S. Circuit Judge

J. Robert Elliott, U.S. District Judge

James L. Wiggins, U.S. Attorney

H. Randolph Aderhold, U.S. Attorney

Vicki R. Crowell, Assistant U.S. Attorney

Art Osborne, Petitioner

TABLE OF CONTENTS

	Page
Question Presented	i
Interested Persons	ii
Table of Contents	iii
Statue	v
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	17
Conclusion	24
Appendix A (11th Cir., Petition for Rehearing and Suggestion of En Banc DENIED, Aug 14, 1997)	1a
Appendix B (11th Cir., Dist. Ct. Order denying motion for reconsideration AFFIRMED, Feb 19, 1997)	3a
Appendix C (Dist. Ct., Motion for Reconsideration DENIED, Dec 13 1995)	5a
Appendix D (Dist. Ct., Order Sustaining Defendant's Motion for Summary Judgment, Oct 30, 1995)	6a

CONTENTS
(Extracts)

	Page
Appendix E (Osborne Petition for Rehearing and Suggestion of En Banc, Apr 4, 1997)	10a
Appendix F (Osborne Reply Brief, Aug 30, 1996)	14a
Appendix G (Government Brief, Aug 16, 1996)	21a
Appendix H (Osborne Brief, 11th Cir., Jul 16, 1996)	23a
Appendix I (Osborne Reply, Dec 11, 1995)	25a
Appendix J (Government Response, Dec 7, 1995	29a
Appendix K (Osborne, Motion for Reconsideration to District Court, Nov 28, 1995)	30a
Appendix L (Government Reply, Jul 3, 1995)	34a
Appendix M (Osborne Response, Jun 19, 1995)	35a
Appendix N (Government Motion to Dismiss or for Summary Judgment, May 26, 1995)	37a
Exhibit A - Contract MDA903-88-C-0407	40a
Exhibit B - ARI Memorandum, Oct 13, 1987	41a
Exhibit C - DSS-W Letter to Litton, Oct 20, '87	44a
Exhibit D - Litton Resubmission, Nov 4, 1987	46a
Exhibit E - ARI Memorandum, Dec 16, 1992	47a
Exhibit F - Osborne Letter to DSS-W, May 1992	48a
Exhibit G - Osborne Resignation, Oct 22, 1987	49a
Appendix O (Osborne Complaint, Mar 24, 1995)	50a

STATUTE

United States Constitution, First Amendment

In The

Supreme Court of the United States

October Term, 1997

No.

Art Osborne,

Petitioner,

v.

United States of America,

Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

Petition for a writ of Certiorari

Art Osborne respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unreported opinions of the United States Court of Appeals for the Eleventh Circuit are reproduced at Appendix A, page 1a, and Appendix B, page 3a. The unreported Order and Denial for Reconsideration of the United States District Court for the Middle District of Georgia, Columbus Division, are reproduced at Appendix C, page 5a, and Appendix D, page 6a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on February 19, 1997. The Court denied a Petition for Rehearing and Suggestion of En Banc on August 14, 1997.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

The First Amendment to the United States Constitution guarantees a citizen the right **"to petition the government for a redress of grievances".**

STATEMENT OF THE CASE

This case arises from the closure of a government contract on January 28, 1993. The United States Army Research Institute for the Behavioral and Social Sciences (ARI) Field Unit at Fort Benning, Georgia (ARI-Benning) used a resident contract to assist in providing research support to the Infantry School at Fort Benning. Litton had been awarded nine contracts and, since completion of Army service in 1978, Art Osborne had managed the contracts for Litton. Funding from ARI was expended in 1989 and the subject contract was operated on Infantry School funds during 1990 and 1991. To reestablish funding in 1992, Art Osborne worked independently from Litton and attempted to expose prejudice within the ARI-Benning staff against retired military personnel being involved in military research. This action alienated ARI, so coordination was made to transfer supervision of the contract from ARI to the Infantry School. As soon as ARI learned that the Infantry School wanted the contract transferred and was eager to apply research funding, ARI took overt action to have the contract closed. The primary motivating factor in the ARI action was reprisal for Art Osborne's challenge of a discriminatory paragraph contained in the subject contract.

With all grievance avenues exhausted, Art Osborne filed a claim under the Federal Tort Claims Act on September 12, 1994 and filed a Complaint in the U.S. District Court for the Middle District of Georgia, Columbus Division, on March 24, 1995. A government attorney devised a fraudulent grievance and misrepresented Petitioner's grievance to the court. **The District Court granted a Motion to Dismiss a grievance that had no relevant relationship whatsoever to the grievance of the Petitioner.**

The paragraph that is central to this case first appeared in a proposal review as paragraph 1.c. of an enclosure to an October 20, 1987 letter from Defense Supply Service-Washington (DSS-W) to Litton. The paragraph reads:

> **"1.c. There has been a failure to understand critical staffing requirements and respond to them, such as the need for skilled senior scientists in all task areas. A fundamental problem with Litton's overall approach is the historical attitude that retired military personnel or junior scientists are capable of performing, and should lead, scientific research. This is evidenced by the local staffing structure which has two levels of former military decision makers before a scientist appears in two of the proposed tasks. It should be noted that the scientists who are then found are relatively junior and have little experience and recently acquired skills. In addition, the junior level scientist structure with retired military in the lead is reflected in the atheoretical and nonconceptual approach to all of the tasks."**

FACTS: This paragraph, consisting of five sentences and 128 words, is the geneses and the basis of Art Osborne's grievance. This paragraph was directed at Litton, with no inference to any other contractor. This paragraph indicates weaknesses in the proposal, with no mention of strengths.

Since the paragraph was employment guidance from the government, Art Osborne, as the hiring authority at Fort Benning, was compelled to challenge the prejudice. He used an offer of his resignation to verify discriminatory intent and to force the Chief of ARI-Benning, Dr. Seward Smith, to eliminate the influence of prejudice on official contract matters. His resignation offer to his Litton supervisor, dated October 22, 1987, read in part:

> "1. This is an offer of my resignation as the Fort Benning Program Manager and/or from Litton Computer Services, to be effective on a date of your choosing. 2. The ARI comments on our proposal, received yesterday, stated very clearly that due to my status as retired military and a former military decision maker, I am not capable of performing scientific research or leading scientific research."

As Art Osborne discussed paragraph 1.c. with Dr. Smith on October 22, 1987, Dr. Smith was adamant in his personal opposition to the prejudice expressed in the paragraph. Dr. Smith said he wanted the paragraph removed from the review; however, he had been advised that the paragraph represented such strong personal bias that if he ordered the discriminatory paragraph removed, he would be subject to a protest from one of the competing contractors. Accordingly, he would not remove or modify the paragraph; however, Dr. Smith made a solemn vow to Art Osborne that he would not allow the prejudice expressed in paragraph 1.c. to influence contract decisions.

FACT: The developers of paragraph 1.c. intended to discriminate against retired military personnel.

Each of the five sentences within the discriminatory paragraph impact on Art Osborne. Having had staffing responsibility for the past decade, sentence #1 indicates he is not capable of understanding staffing requirements. Sentence #2 reflects that his military retirement status prevents him from performing or leading research, in spite of having completed eight previous contracts in an outstanding manner. Sentence #3 makes the point that being a former military decision maker prevents scientific endeavor. With an advanced degree and 17 years of outstanding performance as a senior scientist, sentence #4 reveals that military service prevents Art Osborne from being considered a scientist, even at the apprentice level. Written by cognition experts who know that the intellectual realms of concept and theory separate humans from lower animals, sentence #5 reflects that Art Osborne's retired military status prevents basic intellectual activity.

FACTS: Art Osborne was a party to paragraph 1.c. and it was discriminatory toward retired military personnel.

United States Code 41 § 253b(a) requires that proposal evaluations be "based solely on the factors specified in the solicitation." Solicitation MDA903-87-R-0107 specified the following factors: experience as program manager, publication authorships, academic training and advance degrees, employment with military research organizations, working experience in behavioral sciences, and research and development of Army training programs. On September 15, 1987, each evaluation panel member was provided a memorandum that instructed him or her to "evaluate solely by the criteria established" and to conduct "a fair and impartial evaluation". Between October 2 and October 13,

1987, each panel member signed the following statement: "I have read and understand the requirements of the latest issue of: AR 600-50, Standards of Conduct for Department of the Army Personnel." Army Regulation 600-50 required Department of Army (DA) personnel to:

> "gain a working knowledge of appropriate statutory prohibitions on standards of conduct"; take no "action known or believed to be in violation of US laws, Executive Orders, or applicable directives, instructions, or regulations"; "strictly adhere to the DA program of equal opportunity"; "avoid any action ... that might ... create the appearance of ... Giving preferential treatment to any person or entity ... Losing independence or impartiality".

Litton proposed Art Osborne to be the Program Manager of the ARI-Benning contract. The review panel was required to evaluate Art Osborne's capability to manage the contract on precise factors. However, the only official evaluation of Art Osborne's ability to manage the contract received by Litton was paragraph 1.c. – a statement of gross personal prejudice without reason or logic that violates federal statutes, regulations and policies.

FACT: The evaluation panel had precise evaluation guidance, leaving no room for judgment or choice; therefore, the discriminatory statements of paragraph 1.c. are not sheltered by the discretionary function exception.

With the decision to retain the discriminatory paragraph as an official portion of the government evaluation, the full text was included under "GOVERNMENT COMMENT 1c" of

the Litton Resubmission (PSA-87/018R1) dated November 4, 1987. The subject contract, Developing Training and Systems Solutions for Combat-Critical Tasks, contract number MDA903-88-C-0407, incorporated paragraph 1.c. as a formal part of the contract via the following:

> "the contractor shall perform the work in accordance with Litton's....Technical Resubmission, #PSA-87/018R1, dated 4 November 1987".

FACT: The discriminatory paragraph was a formal portion of the contract that was closed on January 28, 1993.

Art Osborne's complaint was filed in the United States District Court for the Middle District of Georgia, Columbus Division, on March 24, 1995 (page 50a of the appendix). The complaint included 200 pages of documents that addressed the discriminatory language of paragraph 1.c. The Excerpts starting at page 51a, from the first 10 pages of the documents, reflect the focus on paragraph 1.c. A total of three hundred and thirty six (336) references were made to paragraph 1.c. or the language of paragraph 1.c. The formal contract contains about 1000 pages and there may be another 1000 pages that relate to the contract. Except for paragraph 1.c., there is not another paragraph, another sentence, another phrase or another word within these 2000 pages that even hints of discrimination. It is not reasonable that any literate person could review the complaint and fail to recognize the discriminatory language and its source.

FACTS: Art Osborne's complaint was based on the language of paragraph 1.c. (page 4), contained in the contract as "GOVERNMENT COMMENT 1c". Any suggestion of another source is an effort to misrepresent the facts.

While many government contract decisions have probably been influence by prejudice, this may be the only government contract that has been terminated because of illegal prejudice that was clearly stated within the contract. We have an adversarial legal system, and the general rule is that a motion to dismiss is developed anytime a citizen submits a claim against the government. It is then the duty of the Assistant United States Attorney (AUSA) assigned to develop the motion to dismiss to bend and stretch the truth any way he or she can to win the case for the government. But what does an AUSA do when the most generous interpretation of the facts reveals no supporting precedent for a motion to dismiss? In this case, it was decided to discard the Petitioner's grievance and devise a fraudulent grievance that would be easy to defend. The action taken was to claim that the discriminatory paragraph Petitioner referred to was not paragraph 1.c. that had been referenced 336 times in the complaint, but that the discriminatory paragraph Art Osborne referred to was contained in a memorandum that was an evaluation of four contractors -- an internal close-hold ARI document that he had never seen.

The May 26, 1995 Government Motion to Dismiss (page 37a) included the full text of an October 13, 1987 memorandum from ARI-Benning to DSS-W (Defense Supply Service-Washington) as Exhibit B.

All applicable portions of this memorandum are reproduced at pages 41a to 43a. The memorandum appears to have been developed during proposal evaluation; however, it was not related to the contract, petitioner was not a party to the memorandum, all evaluations in the memorandum were fully discretionary, the memorandum contained no violations of policy, regulations or statutes, and

a 60 second reading of the memorandum reveals that it did not contain even a hint of discrimination.

The **switch** from paragraph 1.c. to this memorandum was made in the May 26 1995 Motion to Dismiss, beginning with the following statement:

> "The alleged discriminatory paragraph to which plaintiff refers in his complaint in fact was an evaluation of the strengths and weaknesses of four contractors."

This statement is a lie; however, it is much more than that. It is a lie so absurd and so blatantly obvious that it is inconceivable that any literate person could review the case without recognizing the dishonesty, fraud, deceit and misrepresentation this statement embodies.

FACT: The Government knowingly provided false and misleading information to the District Court.

The June 19, 1995 Plaintiff's Response to Defendant's Motion to Dismiss (page 35a) used Exhibits provided by the Government to again show that paragraph 1.c. was a formal portion of the contract and the basis of the grievance. Also, several other false statements in the Motion to Dismiss that would, if true, result in the claim being denied were addressed: Litton was not notified of contract termination by a December 16, 1992 document, the contract was not closed for the convenience of the Government, the contract did not expire in accordance with its own terms, and the contract was not closed due to lack of funding.

The Defendant's July 3, 1995 Reply (page 34a) was nonsensical and was not responsive to the paragraph 1.c. issue or other relevant issues. The general response to a straightforward presentation of facts by the Plaintiff was that the Plaintiff must be confused.

FACT: The Government avoided addressing the issues that were most germane to the grievance.

The October 30, 1995 Order of the District Court granting Defendant's Motion to Dismiss (page 6a), included the following:

> The contract is completely devoid of any "discriminatory" language which would support the Plaintiff's allegations. The language which he refers to actually appears in an evaluation letter to which the Plaintiff was not a party and which predates the Litton contract. It amounts to no more than an assessment of the various bidders to ARI of which Litton was one. The language of that letter is totally extraneous to the ultimate contract provisions and cannot be the basis of any claim by the Plaintiff....
>
> The Plaintiff's claim in the present case is barred by the discretionary function exception as set fourth in 28 U.S.C. § 2680 (a) because it is based upon a purely administrative decision in evaluating the strengths and weaknesses of the bidders for the contract with ARI to determine which bid was the most advantageous to ARI."

The above is the heart of the rationale used to justify granting the Defendant's Motion to Dismiss. The above is based upon the false assumption that the grievance was

related to the language in the memorandum. The significance of basing a judgment on the non-discriminatory and fully discretionary memorandum (page 41a) rather than the discriminatory and non-discretionary paragraph (page 4) is illustrated in the side by side comparison at page 24a. Also, several other false statements from the Motion to Dismiss were included in the Order without modification: Litton was notified of contract termination by a December 16, 1992 document, the contract was closed for the convenience of the Government, the contract expired in accordance with its own terms, and the contract was closed due to lack of funding.

If, prior to granting the Motion to Dismiss, the District Court gave any consideration to the responses of the Plaintiff concerning any issue, it is not evident from the record. The October 30, 1995 Order from the District Court, pages 6a to 9a, is a precise copy from segments of the May 26, 1995 Government Motion to Dismiss, pages 37a to 39a.

FACTS: The basis of the grievance reflected in the District Court Order is unrelated to the basis of the Petitioner's grievance. The District Court Order is a direct lift from the Government Motion to Dismiss; suggesting that the Petitioner's responses were not considered. The Government was petitioned for redress of a grievance and the grievance was not addressed.

On November 28, 1995, Petitioner Art Osborne filed a motion for reconsideration to the District Court (page 30a). This motion did not meet the time requirements of Federal Rules of Civil Procedure 59 (e); however, the motion was based upon fraud and misrepresentation that was consistent with Federal Rules of Civil Procedure 60(b)(3).

The Defendant's Response of December 7, 1995 (page 29a) was nonsensical and not responsive to the paragraph 1.c. issue. The previous judgment of the court was used to reveal "as a matter of law that the contract is completely devoid of any "discriminatory" language".

FACT: The Judgment of the District Court, obtained with fraudulent information, was used as justification to deny reconsideration.

Petitioner replied to Defendant's Response on December 11, 1995 (page 25a).

The Motion for Reconsideration was denied on December 13, 1995 (page 5a). The denial provided no indication that any material from the Petitioner had been read or considered.

FACTS: The Petitioner was not allowed to have any personal interaction with the District Court and the record contains no evidence that anyone within the Court reviewed or considered anything submitted by the Petitioner.

On 27 December 1995, Petitioner sent a letter to the AUSA that indicated ethics charges would be filed against her unless she could produce some rationale for providing false information to the court concerning the discriminatory language. The reaction to this letter was very telling.

The Appellant Brief of Art Osborne was filed in the United States Court of Appeals for the Eleventh Circuit on July 16, 1996 (page 23a).

The Appellee Brief, page 21a, (Certificate of Service dated August 16, 1996) included the following footnote:

> "It should be noted that plaintiff's allegations of fraud and misrepresentation were reported to the state bars of Alabama and Georgia, and the Department of Justice's Ethics Offices. Those offices found the allegations meritless."

The above statement responds to a charge of fraud and misrepresentation with fraud and misrepresentation. First, there was no finding of meritless or any other finding from the State Bars of Alabama or Georgia. There was a finding of meritless from the Department of Justice; however, that finding was based upon input from the AUSA, claiming that the discriminatory language came from the irrelevant memorandum (discussion at bottom of page 11a). This false and misleading footnote may have influenced the Court of Appeals. Since the basis of the Appeal and the basis of the ethical complaint were one and the same, the footnote advised the Court of Appeals that the State Bars of Alabama and Georgia and the U.S. Department of Justice had reviewed the basis of the Appeal and found it to be meritless.

FACT: The U.S. Attorney and the U.S. Department of Justice supported the fraudulent and unethical behavior of the Assistant U.S. Attorney.

The August 16, 1996 Appellee Brief also included the following:

> "The ARI performed evaluations of the strengths and weaknesses of all four bidders (R1-3-Ex.B). However, only the evaluations and view points which included narrative data regarding Litton was sent to Litton. ... defendant never stated in its brief that

> ARI's evaluation of all four bidders (R1-3-Ex.B) was sent to Litton. Defendant provided that document in a gesture of full disclosure...for whatever value it may have had to the district court."

It is important to note that R1-3-Ex.B is the memorandum (page 41a) that the defendant introduced because it contained the discriminatory paragraph. It is important to note that the memorandum contains no discriminatory paragraph or language. It is important to note that this is the memorandum used as primary justification by the District Court to dismiss the case, i.e., "because it is based upon a purely administrative decision in evaluating the strengths and weaknesses of the bidders". It is important to note that since Litton did not receive the memorandum, that it is physically impossible for the grievance to have been based on the memorandum. It is important to note that all references in the District Court Judgment to the content of this memorandum are in error.

The District Court Judgment also relied upon information contained in a December 16, 1992 memorandum that addressed contract termination (page 47a). With reference to that memorandum, the August 16 1996 Appellee Brief included the admission; "That document was <u>not</u> sent to Litton as stated in defendant's brief".

When the influence of the October 13, 1987 ARI in-house memorandum (evaluation of four contractors) and the December 16, 1992 ARI in-house memorandum (contract termination) is purged from the District Court Order, no substance will remain.

FACT: When those portions of the District Court Order that are based upon fraudulent information are eliminated, no meaningful substance will remain.

The Reply Brief of Appellant Art Osborne was filed August 30, 1996 (page 14a). To highlight the pattern of fraud and misrepresentation, 20 false statements were noted from the August 16, 1996 Appellee Brief.

The Judgment of the District Court was Affirmed by the Court of Appeals for the Eleventh Circuit on February 19, 1997 (page 3a). Extract follows:

> "Though the district court did not specifically analyze the contract language that Osborne included in his complaint as proof of discriminatory motivation, it cannot be assumed that the district court overlooked it; or was unaware that it formed the basis of Osborne's complaint"

The above rationale from the Court of Appeals is without reason or logic. There is not one shred of evidence in the record to suggest that the District Court was aware of the actual grievance. Therefore, the only logical and reasonable assumption that can be made is that the District Court based its judgment on what it believed to be the basis of the grievance. In the alternative, it must be assumed that the District Court knew its judgment was based on a fraudulent grievance. Also, there appears to have been no consideration for the fact that the government admitted the two primary documents that formed the basis of the Judgment were not sent to Litton. In any case, Constitutional rights of the

Petitioner were denied, and the District Court abused its discretion.

Art Osborne filed a Petition for Rehearing and Suggestion of En Banc with the Court of Appeals for the Eleventh Circuit on April 4, 1997 (page 10a).

The Petitions for Rehearing and Suggestion of Rehearing En Banc were DENIED on August 14, 1997 (page 1a).

REASONS FOR GRANTING THE WRIT

This case represents an arrogant and abusive use of power by employees of the federal government against an individual citizen. Over 200 years ago, the Bill of Rights was ratified to protect individuals against the might of the federal government. However, this case reveals that current operational procedures within our federal legal system do not allow for a fair hearing of citizen grievances and that flagrant violations of established ethical standards result in denial of guaranteed Constitutional rights to citizens. While many citizens are disgruntled with the federal legal system, this case offers powerful justification for their disgruntlement. The actions of government attorneys and the lower courts in this case provide clear and compelling evidence that the supervisory power of the Supreme Court is essential to insure that individual Constitutional rights are not denied and to restore public respect, trust and confidence in our federal legal system.

Art Osborne, as a private citizen or independent contractor, has a guaranteed First Amendment right "to petition the Government for a redress of grievances." The genesis and basis of Art Osborne's grievance is a paragraph 1.c. (labeled GOVERNMENT COMMENT 1.c.) within the subject contract that reflects: *all retired former military decision makers are incapable of performing or leading research and are incapable of taking a conceptual or theoretical approach to research issues.* The District Court granted a Motion to Dismiss a grievance that was based upon *an evaluation of four contractors*. This evaluation of four contractors was contained in a memorandum the Petitioner had never seen and nothing in this memorandum was related in any relevant way to the grievance of the Petitioner. While the courts have a right to dismiss Petitioner's grievance if a supporting statute can be identified, the courts should not be allowed to dismiss Petitioner's grievance by addressing a fraudulent and unrelated grievance. To satisfy guaranteed Constitutional rights, the court must address the grievance of the petitioner.

The Court should address this case because it is an obvious violation of First Amendment rights that most school kids who visit the corridors of the Supreme Court can understand. To demonstrate the simplicity of the case, Petitioner set-up a test for his granddaughter who attends the first grade in Alabama. Emily was given a copy of paragraph 1.c., the basic of the grievance, and it was explained that the game involved three items that were under a Mickey Mouse towel -- she was to select one of the three items that was the closest match to the paper she had in her hand. The cover was removed, exposing paragraph 1.c. on the left, a Mother Goose book in the center and the memorandum used as the basis of the grievance by the Court on the right. She looked at each of the three items and picked up the paper containing

paragraph 1.c. The total elapsed time was three seconds. This test may not be fair, because other first grade students are not as pretty and not as smart as Emily. However, the "test" presented in the original complaint was actually easier because the time was increased from three seconds to eight weeks, the distracters of the Mother Goose book and the memorandum were not presented, and 336 clues to the correct answer (paragraph 1.c.) were provided. Given this, it is reasonable to conclude that the Assistant United States Attorney (AUSA), assigned to develop the motion to dismiss, was able to conclude, with absolute certainty, that paragraph 1.c. was the basis of the grievance. Therefore, when the AUSA advised the District Court that "The...paragraph...was an evaluation of...four contractors", it must be concluded that she knew the statement was false and that it was presented to the court for one primary reason; to prevent the basis of the Petitioner's grievance from being considered by the District Court.

The actions of the AUSA may also be viewed as adding insult to injury. The discriminatory paragraph, listed in the contract as GOVERNMENT COMMENT 1.c., reflects that all retired military personnel are too stupid to participate in research. It is quiet obvious the Petitioner thought that was the basis of his grievance, since he referred to it 336 times in his complaint. However, the AUSA, perhaps on cue from the Government Comment, seems to have assumed that a retarded military guy would not be capable of understanding his grievance. Accordingly, the AUSA advised the court that the Petitioner had made references to the wrong paragraph. The silly and frivolous grievance presented to the court appears to be the grievance of a demented person, fully consistent with the prejudice expressed in paragraph 1.c. This arrogant and abusive behavior should be expected to

continue until the supervisor power of the Supreme Court is used to curtail fraudulent and unethical conduct within our federal legal system.

The following terms are central to the discriminatory paragraph 1.c.; *retired military, decision maker, former military, capable of performing, capable of leading, conceptual, nonconceptual, theoretical and atheoretical.* In material developed by the Defendant, the term *retired military personnel* was used twice and each time it was attributed to a statement from Art Osborne. With that exception, in some 60 pages of original material developed by the Defendant and some 10 pages developed by the Courts, none of the above terms were used. No hint of the discriminatory language that forms the basis of Petitioner's grievance can be found in the 70 pages generated by the Defendant and the Courts, providing clear evidence that the Petitioner's grievance has not been addressed by the Courts.

There is a highly significant difference in basing a judgment on the grievance of the Petitioner and basing a judgment on the grievance addressed by the Court. The paragraph that is the basis of the Petitioner's grievance (page 4) is a very unique segment of a government contract. The current record offers proof that it represents a non-discretionary action that is in "violation" of the Army and Department of Defense Policy Against Discrimination, Army Regulation 600-50 Standards of Conduct, Federal Acquisition Regulations, and United States Code Title 41 § 253b(a) Proposal Evaluation. A trial will confirm the current circumstantial evidence that the paragraph represents a violation of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, and Vietnam Era Veterans Readjustment Assistance Act of 1974. The

basis of the grievance addressed by the Court is a fully discretionary memorandum (page 41a) that violates nothing. The grievance addressed by the District Court should have been dismissed; however, it had no relevant relationship whatsoever to the grievance of the Petitioner. When this level of absurdity is acceptable within the lower courts, the supervisor power of the Supreme Court is needed.

The only support the AUSA has for claiming that the memorandum is the source of discriminatory language is that the memorandum was found in a box of contract files. If a Mother Goose book had been found in the box of contract files and the court dismissed the case because "losing a shoe for want of a nail" is not a valid claim, it would have the same relationship to Art Osborne's grievance as the existing Order from the District Court. While this sounds absurdly silly, more prejudice can be found in the Mother Goose book than in the memorandum the District Court used as the source of discriminatory language.

Why would an Assistant U.S. Attorney provide information to a court so preposterous that a first grade student can recognize it is a lie? Since every literate person within the court who reviewed the case would recognize fraud and misrepresentation, it must be concluded that the court allows the Government to use fraud and misrepresentation to defeat claims from private citizens. If the AUSA had developed a motion to dismiss based upon the discriminatory and non-discretionary paragraph, it would have been, at best, a very weak and questionable motion with no supporting precedent. However, falsifying the grievance allowed for a strong and convincing motion to dismiss, that the District Court embraced without question and without

debate. It must be assumed that the District Court did not want to address the grievance of the Petitioner. The failure to address the grievance of the Petitioner is not within the discretion granted to the court, because it is in direct violation of a guaranteed First Amendment right.

It is inconceivable that the lawyer for a civilian defendant would attempt to use the Mother Goose defense strategy, (i.e., if you don't like defending the complaint presented, just make-up a complaint that will be easy to defend). When the AUSA elected to use the Mother Goose defense, she must have expected that the District Court would support fraud and misrepresentation and that her actions would be fully supported by the senior leadership of our federal legal system. In fact, that support was demonstrated when Art Osborne threatened to file ethics charges against the AUSA. The U.S. Attorney and the U.S. Department of Justice each refused a request from Art Osborne to present support for an ethics charge, but each found the charge, presented by the AUSA, to be meritless. How can a U.S. Attorney and the U.S. Department of Justice issue a meritless finding when they have received supporting input from only the accused? It appears that the standard operating procedure is to find all ethics charges from U.S. Citizens against a government lawyer to be meritless. Therefore, facts supporting the allegations are superfluous. The supervisory power of the Supreme Court is required to modify current ethical behavior within our federal legal system.

This case revealed that when a private citizen has a grievance against a government agency or a government employee, the federal court system is the only grievance avenue available. The same general rule appears to be applicable to all agencies and programs, such as the U.S.

Equal Employment Opportunity Commission, Federal Contracts Compliance Program and Whistleblower legislation. That is, Government employees may file charges against civilians or other government employees and civilians may file charges against other civilians; however, civilians are not allowed to file charges against government employees. Major governmental departments, like the Department of Justice, have enforcement responsibility for federal statutes and are responsible for eliminating discrimination in federal programs. However, if government employees violate federal statutes and discriminate against individuals who are not government employees, the role of the Department of Justice, as demonstrated by this case, is to support the unethical and fraudulent activities of government attorneys to deny the Constitutional rights of citizens for a fair redress of grievances. Also, it appears that the individual right to no self-incrimination has been transferred to each government employee. Accordingly, no employee can admit the obvious; that paragraph 1.c. is discriminatory. Therefore, when responding to questions, they are required to lie, evade or provide nonsensical responses. If the route to the federal court system is blocked through the fraudulent and unethical behavior of government lawyers, there is, in effect, no grievance avenue available to any citizen who may have a complaint against an employee of the federal government. The supervisory power of the Supreme Court is needed to insure that citizens are allowed to petition the government for redress of grievances, as guaranteed by the First Amendment.

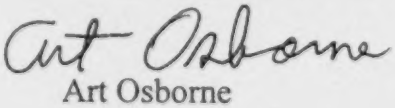
The Petitioner's review of records revealed no Supreme Court case that addressed the unethical behavior of government lawyers. Government lawyers in this country have a reputation for lying, cheating and stealing because the

senior leadership of our federal legal system allows the unethical and fraudulent behavior demonstrated in this case to be the standard for dealing with individual citizens. The denial of a First Amendment right was directly related to ethical violations of government employees and government attorneys, who operate without adequate accountability for unethical behavior. The supervisory power of the Supreme Court is essential to preserve public respect, trust and confidence in our Federal Legal System.

CONCLUSION

In accordance with the First Amendment to the United States Constitution, Art Osborne petitioned the Government for redress of a grievance. The United States District Court for the Middle District of Georgia, Columbus Division addressed and dismissed a fraudulent grievance that was unrelated to the grievance of the Petitioner. To satisfy guaranteed Constitutional rights, the District Court must address the grievance of the Petitioner. The petition for a writ of certiorari should be granted.

Respectfully submitted.



Art Osborne
Petitioner
3650 Denewood Court
Columbus, Georgia 31909
Phone: (706) 563-3674
Fax: (706) 568-6557
ArtOsborne@msn.com

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8135

ART OSBORNE,
Plaintiff-Appellant,
Versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Filed
U.S. Court of Appeals
Eleventh Circuit

AUG 14 1997

Miguel J. Cortez
Clerk

On Appeal from the United States District Court for the
Middle District of Georgia

On Petition(s) for Rehearing and Suggestion(s) of Rehearing En Banc (Opinion_____, 11th Cir., 19__,____F.2d____).

Before: COX and BLACK, Circuit Judges, and
KRAVITCH*, Senior Circuit Judge.

Per Curiam:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

Entered for the Court:

s/ Susan H. Black
United States Circuit Judge

ORD-42
(6/95)

*Judge Kravitch was in regular active service when this matter was originally submitted but has taken senior status effective January 1, 1997.

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8135
Non-Argument Calendar

D. C. Docket No. 4:95-CV-37 (JRE)

ART OSBORNE,
Plaintiff-Appellant,
Versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Filed
U.S. Court of Appeals
Eleventh Circuit

FEB 19 1997

Miguel J. Cortez
Clerk

Appeal from the United States District Court
for the Middle District of Georgia

(February 19, 1997)

Before: COX and BLACK, Circuit Judges, and
KRAVITCH, Senior Circuit Judge.

Per Curiam:

Appellant Art Osborne appeals the denial of his pro se motion for reconsideration of the district court's order dismissing his Federal Tort Claims Act action. He claimed that his termination by the Army Research Institute was motivated by illegal discrimination based on age, sex, and Vietnam Veteran's status. He now alleges that the Government misled the district court regarding the basis of his complaint, causing the district court to believe that his complaint was founded on non-discriminatory contract language.

Though the district court did not specifically analyze the contract language that Osborne included in his complaint as proof of discriminatory motivation, it cannot be assumed that the district court overlooked it; or was unaware that it formed the basis of Osborne's complaint. Osborne reminded the district court at great length in his motion for reconsideration that his claim was predicated on the language in the paragraph. The district court did not abuse its discretion in denying the motion for reconsideration.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ART OSBORNE,
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant

Case no. 4:95-CV-37 (JRE)

Filed 10:00 AM

DEC 13 1995

"S/ Illegible"
Deputy Clerk
U.S. District Court
Middle District of Georgia

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION

On October 30 1995, the Court filed its opinion and order sustaining the Defendant's motion for summary judgment in the case above identified, and on November 28, 1995, the Plaintiff filed a motion for reconsideration of the Court's order, and thereafter the Plaintiff and counsel for the Defendant submitted memoranda in support of their respective positions. The Court being satisfied that the Court's order of October 30, 1995, was a proper disposition of this case, the Plaintiff's motion for reconsideration is hereby denied.

IT IS SO ORDERED, this 13th day of December, 1995.

s/ J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ART OSBORNE, Case no. 4:95-CV-37 (JRE)

Plaintiff

vs.

UNITED STATES OF AMERICA,

Defendant

Filed 3:32 PM
OCT 30 1995
"S/ Illegible"
Deputy Clerk
U.S. District Court
Middle District of Georgia

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE. FOR SUMMARY JUDGMENT

This is a complaint brought under the provisions of the Federal Tort Claims Act by which the Plaintiff seeks money damages for the loss of his employment with Litton Computer Services (Litton), a defense contractor with the Army Research Institute (ARI) Field Unit at Fort Benning, Georgia. The Plaintiff alleges that due to negligent supervision by a government employee who was the Chief of the ARI a discriminatory paragraph was allowed to be included in the contract entered into on January 28, 1988, between the ARI and Litton and that as a result of the discriminatory paragraph the contract was closed on January 28, 1993, and that ARI refused to allow a transfer of the contract and terminated subsequent funding for the contract.

He claims that this caused him to suffer the loss of his job and salary from Litton. The Defendant has filed a motion to dismiss or in the alternative for summary judgment and has filed a brief in support of the motion, contending that the Plaintiff's claims are barred by: (1) the discriminatory function exception; (2) The interference with contract rights exception; and (3) the two year statute of limitations. The Plaintiff has filed a brief in opposition to the motion.

The Plaintiff was employed as project manager of the contractor Litton from July 10, 1978, through January 28, 1993. After ARI evaluated the four bidders for the contract ARI awarded the contract to Litton on January 28, 1988. The contract by its own terms and pursuant to federal regulations was contingent upon funding and by the ARI's requirement for the services. The provisions and conditions of the contract were controlled by the Federal Acquisition Regulations which authorized the government to terminate the contract if the contracting officer determines that termination is in the government's interest.

Thereafter, ARI notified Litton by letter on December 16, 1992. that it recommended that action be taken to terminate the contract, explaining that funding had been reduced for fiscal years 1990 through 1996 due to ARI's budget decreases, and stated that termination was for the convenience of the government. Although ARI recommended termination of the contract, the term of the contract was for a period of five years and it expired in accordance with its terms on January 28, 1993, without the necessity of formal termination by the government, and Litton agreed that the contract ended in accordance with its terms.

The contract was solely between Litton and ARI, but the Plaintiff implies throughout his complaint that he was injured by discriminatory language relevant to the contract. The contract is completely devoid of any "discriminatory" language which would support the Plaintiff's allegations. The language which he refers to actually appears in an evaluation letter to which the Plaintiff was not a party and which predates the Litton contract. It amounts to no more than an assessment of the various bidders to ARI of which Litton was one. The language of that letter is totally extraneous to the ultimate contract provisions and cannot be the basis of any claim by the Plaintiff. Further, the Federal Tort Claims Act contains several express exceptions which were designed explicitly to preserve immunity for the government as to certain claims, 28 U.S.C. § 2680, and a claim which falls within the purview of an exception is barred for lack of subject matter jurisdiction. Payne v. United States, 730 F.2d 1434 (11th Cir. 1984).

One of these exceptions is the "discretionary function" exception which excludes any tort claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The Plaintiff's claim in the present case is barred by the discretionary function exception as set forth in 28 U.S.C. § 2680(a) because it is based upon a purely administrative decision in evaluating the strengths and weaknesses of the bidders for the contract with ARI to determine which bid was the most advantageous to ARI. United States v. Gaubert, 499 U.S. 315 (1991); Boyle v. United Technologies Corp., 487 U.S. 500 (1988); Berkovitz v. United States, 486

U.S. 531 (1988). These cases make it clear that the discretionary function exception creates a bar to the Plaintiff's suit, and the Defendant's motion for summary judgment must be and is hereby sustained for reason that the Court lacks subject matter jurisdiction of the complaint.[1]

IT IS SO ORDERED, this 30th day of October, 1995.

s/ J. Robert Elliott
United States District Judge

Entered on Docket

October 30, 1995

Gregory J. Leonard, Clerk
By "s/ Illegible"
Deputy Clerk

[1] This determination makes it unnecessary for the Court to consider the other defenses asserted by the defendant.

APPENDIX E

(EXCERPTS)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR REHEARING
and
SUGGESTION OF EN BANC
of
ART OSBORNE as APPELLANT

April 4, 1997

The Court of Appeals decision of February 19, 1997, reflects "He now alleges that the Government mislead the district court regarding the basis of his complaint..." This is no longer an alleged statement. A review of the August 16, 1997, Government Brief reveals that the two primary documents that formed the basis of the district court motion to dismiss order were not provided to the contractor. This means that the district court was mislead by the erroneous Government input. When the influence of these two documents is purged from the order, no support will remain for a motion to dismiss.

The Court of Appeals decision indicates that it can not be assumed that the district court overlooked paragraph 1c or was unaware that it formed the basis of my complaint – that I reminded the district court at great length in my motion for reconsideration. Yes, I did. However, on March 24, 1995, I provided the district court with a 210 page complaint which

was focused on paragraph 1c – it included three hundred and thirty six (336) references to paragraph 1c or the language of paragraph 1c. In my response of June 19, 1995, I used exhibits from the government motion to dismiss to show conclusively that paragraph 1c is a formal part of the contract and that it was impossible for the memorandum introduced by the government to have been the basis of my complaint. Additionally, I made another 20 references to paragraph 1c. The district court had my complaint with extensive references to paragraph 1c for over six months prior to the October 30, 1995, order. One of two things had to occur; the district court did not consider any of my input and just used input provided by the government or the district court reviewed my material and elected to use bogus material to dismiss the case. It is not reasonable to assume anything different occurred during the two weeks they had my motion for reconsideration. Since I was not allowed to interact with the district court, I do not know if they were or were not aware of my complaint; however, it is an abuse of discretion in either case, because they knew or should have known that their order was based on bogus documents. I believe the Court of Appeals should assign appropriate values to hard facts and unsupported assumptions and evaluate the validity of the district court order in view of the government's admission that it is based on bogus documents.

It is important to note that while the AUSA is guilty of dishonesty, fraud, deceit, and misrepresentation, she appears to be operating in accordance with standard operating procedures, because her actions have been fully supported by the Court, the Office of the United States Attorney, and the United States Department of Justice. The footnote on page 9 of the August 16, 1996, Government Brief is illustrative: "It should be noted that plaintiff's allegations of fraud and

misrepresentation were reported to the state Bars of Alabama and Georgia, and the Department of Justice's Ethics Offices. Those offices found the allegations meritless." Since my ethical complaint had the same basis as my Rule 60(b)(3) Appeal, this is a highly significant footnote – it means that the State Bars of Alabama and Georgia and the United States Department of Justice have found the basis of my appeal to be meritless. The facts are as follows: On December 27, 1995 I sent a letter to the AUSA, advising her that I intended to file ethics charges with the State Bars of Alabama and Georgia on January 12, 1996, unless she could provide some evidence suggesting that she did not knowingly provide false information to the court. I received no input, so I mailed a notice of complaint to Alabama and Georgia, asking each to advise me to whom I should direct a complaint. On January 16, 1996, I received a letter, dated January 12,1996, from the United States Attorney, Middle District of Georgia, indicating they had found that the AUSA had taken no action to mislead the court and that my allegations were without any justification in fact. Since their findings had been based on input from the AUSA, I requested that I be allowed to present support for a complaint. By three letters dated January 19, 1996: the Georgia State Bar returned my notice without action because they had no record of the AUSA; the Alabama State Bar returned my notice without action because they had been advised that the Office of the United States Attorney had found my allegations unwarranted and that my complaint had been referred to the Department of Justice; and the United States Attorney refused my request to present my complaint and refused my alternative request to arrange for me to present it to the Justice Department. By letter of January 23, 1996, I asked the Justice Department Office of Professional Responsibility to allow me to present support for an ethical complaint. Their letter of February 1,

1996, refused that request and provided their finding of meritless, listing as supporting rationale that I had already raised my "allegations with the court and with the Alabama State Bar without success." So, how accurate is the footnote? The meritless finding of the Georgia Bar is false. The meritless finding of the Alabama Bar is false. The meritness finding of the Justice Department is true; however, I was not allowed to present support for a complaint and the finding is based on false information provided by the AUSA. It is also worth noting that during the above action the AUSA claimed to have certifications on the subject documents and then, in the Government Brief, admitted that the documents were fraudulent. Since the above actions are easy to verify, I do not believe the Eleventh Circuit Court of Appeals should allow a Government Lawyer to use fraud and misrepresentation as proof that fraud and misrepresentation is not the basis of the subject District Court Order.

Title 28 U.S.C. § 2680 grants government employees a broad range of discretionary exclusions and this provides fertile ground for abuses. If government employees and government lawyers are not bound by an ethical code and are allowed to render the discretionary ruling without debate or challenge by the courts, it is reasonable to assume that every action of every government employee will be protected by the discretionary exclusion – and, as in this case, that subverts the law.

When the discretionary function exception is not applicable, Title 28 U.S.C. § 2674 equates liability of the government to a private individual under like circumstances. However, 28 U.S.C. § 2674 will never be applicable if government employees and government lawyers have been allowed to make the discretionary ruling in an unchallenged environment, as in this case, and that subverts the law.

APPENDIX F

(EXCERPTS)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF
of
ART OSBORNE as APPELLANT

August 30, 1996

PATTERN OF FRAUD AND MISREPRESENTATION IN APPELLEE BRIEF

Since a focus of this appeal is that false and misleading information was provided to the lower court by the Defendant, it appears appropriate to address those areas of the current Appellee Brief which present false and/or misleading information to the Court. The following is a quick review of false and/or misleading statements contained in the Appellee Brief:

ARI evaluated the four bids in accordance with 41 U.S.C 253 b. (False - 253b(a) requires the evaluation to be based solely on factors specified in the solicitation, like evidence

of successful performance in research and development. However, the only evaluation of my personal qualifications received by my employer was that all retired military personnel are too stupid to participate in military research - a clear violation of 41 U.S.C. 253b(a).)

The October 20, 1987 DSS-W Letter to Litton was a follow-up to the October 13, 1987 ARI internal Memorandum. (False - to be a follow-up, there must have been something previous -- there was nothing previous, so the letter can not be a follow-up.)

The October 20, 1987 DSS-W Letter contained the alleged discriminatory paragraph that is the gravamen of the plaintiff's complaint. (Confusing - Can the Defendant explain why this alleged paragraph has never been presented to the court in any form? - why an irrelevant Memorandum which I had never seen and which included no hint of discriminatory language was presented to the court as the source of discriminatory language? - why the dismissal Order, which is based on the fact that the ARI Memorandum includes no discriminatory language and represents fully discretionary actions, can be considered valid?)

Litton responded to the alleged discriminatory paragraph without protest. (Misleading - prior to response, Chief of ARI-Benning informed Litton not to be concerned with the paragraph.)

ARI notified Litton by letter of December 17, 1992, that it could not recommend extension of the contract. (False - ARI did not notify Litton.)

Defendant never stated in its brief that ARI's evaluation of all four bidders (October 13, 1987 Memorandum) was sent to Litton. (True - However, their May 26, 1995 Motion implied and inferred that the Memorandum was sent to Litton in such a way that any literate person reading the brief would have to assume that the Memorandum was sent to Litton. Otherwise, how could the October 20 letter be a follow-on and how could it be the source of discriminatory language? How could Judge Elliott have signed an Order which was based on a Memorandum the plaintiff had never seen and which the Defendant says was not sent to the plaintiff? The Court may consider the possibility that the Defendant is providing false and misleading information to the Court, using nonsensical language as camouflage.)

Defendant provided the October 13, 1987 ARI internal Memorandum in a gesture of full disclosure. (False - It was a fabrication of evidence designed to influence the lower court.)

Defendant provided the October 13, 1987 ARI internal Memorandum pursuant to Fed. R. Civ. P. 26. (False - It was not a relevant discovery, which is plain and obvious on its face.)

The Litton contract expired without the necessity of formal termination by the government. (False - the contract required formal termination by DSS-W.)

Litton agreed the contract ended in accordance with the contract's terms. (Misleading - standard response required by Litton standard operating procedure.)

Defendant provided the December 16, 1992 ARI internal Memorandum to show the basis of ARI's denial of plaintiff's request for an extension of the contract. (False - used in the dismissal Order as bogus notification to Litton.)

Plaintiff's complaint indicated he knew of decreased funding problems. (Misleading - ARI had experienced drastic funding reductions and decisions concerning contract funding were fully discretionary, but that is not related to my complaint.)

The district court dismissed the plaintiff's claim based upon the same record that is now the basis of this appeal. (False - The current record, minus the two irrelevant Memorandums, is vastly different from the previous record.)

The court below correctly concluded that plaintiff's lawsuit was barred by the discretionary function exception. (False - The court concluded a bogus suit was barred. The defendant now admits that the Order was based on bogus information. Therefore, it is not reasonable to use the findings of the court, which were based on bogus information, to assign credibility to those findings.)

The court's failure to address the issues of misrepresentation and deceit infers that it judged them insubstantial and unpersuasive. (False - failure to address infers they failed to address.)

Plaintiff failed to present exceptional circumstances which would justify remand of his case. (False - an objective reading of my Brief reveals "exceptional circumstances".)

All of the documentation contained in the current record was before the district court when it granted defendant's Motion for Summary Judgment. (False - with the elimination of the October 13, 1987 Memorandum, it must be replaced with the discriminatory language of the October 20, 1987 Letter.)

The Defendant filed no affidavits of any person. (Misleading - I reviewed a draft affidavit which was prepared by Major Jeffery D. Smith to support the Defendant's position on the October 13, 1987 Memorandum, but the affidavit had one major flaw - it was truthful - and therefore provided no support to Defendant's position. Accordingly, the Court must consider the possibility that no affidavits were filed by the Defendant because none were supportive of Defendant positions, e.g., the Defendant can not obtain an affidavit to counter any statement I have labeled as false. If there is any interest in the truth, the Court should also consider the relative worth of personal affidavits compared to the official public record.)

The official Army records speak for themselves. (False - as demonstrated by the gross misuse of official documents.)

All of the documentation contained in the record was before the court prior to its ruling on plaintiff's Motion for Reconsideration. (False - a nondiscriminatory/discretionary document has been replaced with a discriminatory/nondiscretionary document as the source of plaintiff's complaint.)

The district court was apparently not persuaded by plaintiff's allegations of fraud. (Misleading - the record is more supportive of the notion that the district court did not review the allegations.)

The Defendant error of mis-stating the recipient of a document does not materially change the evidence presented in the case below or the basis for the district court's decision. (False - the defendant error of mis-stating resulted in the dismissal Order being based on two documents which grossly misrepresented plaintiff's complaint.)

There is no newly discovered evidence such that a new trial would probably produce a new result. (False - there has been no trial and when the discriminatory paragraph, newly discovered or not, replaces the irrelevant Memorandum, the results should be vastly different.)

The State Bar of Georgia found plaintiff's allegations of fraud and misrepresentation to be meritless. (False - Their letter of January 19, 1996 returned my grievance without action because they had no listing for Vicki R. Crowell.)

The Alabama State Bar found plaintiff's allegations of fraud and misrepresentation to be meritless. (False - Their letter of January 19, 1996 returned my grievance without action because they had been advised by Ms. Vicki R. Crowell that the United States Attorney for the Middle District of Georgia had referred my allegations to the Department of Justice's Office of Professional Responsibility.)

The Department of Justice found plaintiff's allegations of fraud and misrepresentation to be meritless. (Misleading - Their letter of February 1, 1996 listed their primary finding as "Our review of your submission has determined that the proper forum in which to raise your claims is the court."

Plaintiff has failed to produce any independent evidence in support of fraud. (False - the Court should note, during Oral Argument, that the Defendant will not present credible evidence or rationale to refute a single issue I have labeled as false.)

The documentation in the record available for review has not changed. (False - a discriminatory/nondiscretionary paragraph had replaced a nondiscriminatory/discretionary Memorandum.)

Plaintiff is merely attempting to re-litigate previous arguments supported by the same evidence that has already been considered and rejected. (False - the real evidence was not addressed by the lower court.)

APPENDIX G

(EXCERPTS)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF APPELLEE

August 16, 1996

The ARI performed evaluations of the strengths and weaknesses of all four bidders (R1-3-Ex.B). However, only the evaluation and view points which included narrative data regarding Litton was sent to Litton. The evaluation sent to Litton (dated October 20, 1987) which was in the form of a follow-up letter to the October 13, 1987 evaluation of all four bidders contained the alleged discriminatory paragraph that is the gravamen of the plaintiff's complaint (R1-3-Ex.C-p.3).[2]

[2] Defendant's brief in support of its Motion to Dismiss correctly referred to the evaluation letter to Litton by exhibit number (R1-3-Ex.C). Plaintiff alleges otherwise, but defendant never stated in its brief that ARI's evaluation of all four bidders (R1-3-Ex.B) was sent to Litton. Defendant provided that document in a gesture of full disclosure and pursuant to Fed. R. Civ. P. 26 for whatever value it may have had to the district court.

[3] Defendant's brief (R1-3-3,4) did refer to an internal Army document that recommended termination of the Litton contract due to reduced funding. That document was not

sent to Litton as stated in defendant's brief but was provided to show the basis of ARI's denial of plaintiff's request for an extension of the contract…

Although the defendant mis-stated the recipient of a document, the addresses of the document are plain and obvious on its face, and that error does not materially change the evidence presented in the case below or the basis for the district court's decision…

The documentation in the record available for review has not changed…

APPENDIX H

(EXCERPTS)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF ART OSBORNE AS APPELLANT

July 16, 1996

The following side by side comparison illustrates the vast difference between the Order signed by Judge Elliott and the actual facts. Each extract in the left column is taken from the October 30, 1995 Order signed by Judge Elliott (Tab 7) and each extract in the left column is consistent with the October 13, 1987 Memorandum (Tab 3-B). Additionally, each extract in the left column is false. The column on the right provides accurate information, based on paragraph 1.c. contained in the October 20, 1987 Letter and the Litton/ARI contract.

Extracts from Order signed by Judge Elliott	Actual facts -- based upon para. 1.c. and the contract
"contract is completely devoid of any discriminatory language"	Contract contains language very discriminatory toward retired military personnel.
"Plaintiff was not a party"	Plaintiff was the focus of discriminatory language.
"predates the Litton contract" (never part of contract)	A formal portion of the ARI/Litton contract.
"an assessment of the various bidders to ARI"	Assessment of Litton only.
"language...totally extraneous to the...contract"	Language was a formal portion of the contract.
"case is barred...because it is based upon a purely administrative decision in evaluating the strengths and weaknesses of the bidders"	The case is based upon illegal discrimination, which is not discretionary. The evaluation was of Litton only and only weaknesses were addressed.

The Government defense strategy appears to be quiet simple and direct; just make up facts which are easy to defend.

APPENDIX I

(EXCERPTS)

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR RECONSIDERATION

December 11, 1995

FACTS

The 26 May 1995 Government Motion to Dismiss included a 13 October 1987 Memorandum from ARI-Benning as Exhibit B. This Memorandum was completely devoid of any "discriminatory" language which would support my allegations. This was an evaluation to which I was not a party and which predates the Litton contract. It amounts to no more than an assessment of the various bidders to ARI, of which Litton was one. The language of that memorandum is totally extraneous to the ultimate contract provisions and cannot be the basis for my claim. The memorandum represents a discretionary function of ARI because it is based upon a purely administrative decision in evaluating the strengths and weaknesses of the bidders for the contract with ARI to determine which bid was the most advantageous to ARI.

The formal ARI-Litton contract contains about 1000 pages. Portions of the contract were included as Exhibits A and D of the 26 May 1995 Government Motion to Dismiss. The paragraph at the top of page 1-12, Exhibit D, titled GOVERNMENT COMMENT 1c, contains the discriminatory language which is related to my claim. This paragraph reflected personal prejudice against all retired

military personnel; that is, they are not capable of performing or leading research and they are not capable of taking a theoretical or conceptual approach to research issues.

DISCUSSION OF FACTS

All parties to this case appear to agree with the above facts concerning the 13 October 1987 pre-contract memorandum. However, the language in the pre-contract memorandum is not related, in any way, to the discriminatory language associated with my claim and the Government does not have one thread of evidence to show that it does. Additionally, any literate person who reviews my Request for Reconsideration can see that the discriminatory language is part of the ARI-Litton contract. However, Government attorneys have elected to provide false information to the Court by proclaiming that the language associated with my claim came from the pre-contract memorandum.

COMMENTS ON EXCERPTS FROM DEFENDANT'S RESPONSE

"the Court erroneously relied upon the Litton-ARI contract language rather than the pre-contract evaluation memorandum"...This is false. This purports to reveal the basis for my reconsideration request; however, reading my Request reveals that I made a case for the exact opposite.

"plaintiff thinks the Court did not understand which document was legally controlling"... The previous quote reflects that the Government does not yet understand which document is legally controlling.

"the pre-contract memorandum was not given proper weight." This is an absurd statement, given that the pre-contract memorandum is not relevant and should be given no weight.

"the Army decision to let the Litton-ARI contract run out was within the scope of the discretionary function..." Yes; however, the overt action taken by ARI to close the contract was motivated by discrimination and reprisal for my challenge of discrimination, which is not a discretionary function.

"Osborne seems angry with those individuals who made the operative decisions"... I am not angry at any individual, but I am appalled that attorneys are allowed to lie so blatantly.

"the Court should be able to see that their acts offended him." No; however, I believe the Court should see that the Judgment was based on false information and I assume the Court would prefer that its Judgments are based on actual facts.

"all of this information comes from the plaintiff himself"... This statement is false. None of the false information came from me and I will withdraw my claim if one false statement can be identified in anything I have signed.

"or from official Government documents"... This statement is false on many counts. Some of the false statements did come from official Government documents; however, they were taken out of context and used in a manner which presented false statements. My Request for Reconsideration allows any reasonable person to see that the Government documents support my side of this issue.

"The Plaintiff confuses the difference between that which he considers "false" and the Court's findings"... The Court was presented with false information, and the Court made a valid Judgment based on that information. However, the Judgment is invalid because it was based on false information.

"The Court found as a matter of law that the contract is completely devoid of any "discriminatory" language"... The Defendant presented a pre-contract memorandum to the Court and the Court found it to be devoid of discriminatory language. The Court would probably find a Mother Goose book to be devoid of discriminatory language also, but neither is related to the contract language associated with my complaint.

APPENDIX J

(EXCERPTS)

DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR RECONSIDERATION

December 7, 1995

The court found as a matter of law that the contract is completely devoid of any "discriminatory" language which would support the plaintiff's allegations...

The request for reconsideration offers nothing to change the evidence on the Court's findings...

APPENDIX K

(EXCERPTS)

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

PLAINTIFF'S MOTION FOR RECONSIDERATION

November 28, 1995

Since paragraph 1.c. accurately reflected the views of some panel members, it was not deleted or modified. Therefore the full text was presented in the 4 November 1987 Litton Resubmission, Exhibit D. At the top of page 1-12 of Exhibit D, paragraph 1.c. is under the heading of GOVERNMENT COMMENT 1c. This is the same five sentence, 128 word paragraph in Exhibit C and the same paragraph which my resignation letter at Exhibit G referred to.

The basic contract is at Exhibit A. Page 1b of the contract incorporated the 4 November 1987 Litton Resubmission, Exhibit D, making the Resubmission and paragraph 1.c. a formal part of the Litton contract with ARI.

While avoiding all of my input which could be labeled as self-serving, any reasonable person can follow the discriminatory language from its inception at Government Exhibit C, to Government Exhibit G, to Government Exhibit D, and to its inclusion in the contract at Government Exhibit A. Then why was this Judgement based on the language

contained in the 13 October 1987 Memorandum at Exhibit B? It appears that the Government could not defend against paragraph 1.c., so the 13 October Memorandum was introduced because it contains no discriminatory language, it represents a purely discretionary function and it was never part of the contract.

The following additional information is presented to show that my case could not be based on the 13 October Memorandum:

• The full 15 page text of the 13 October 1987 ARI Memorandum is at Exhibit B. While it contains all of the language suggested in the 30 October 1995 MEMORANDUM AND ORDER ON DEFENDANT'S MOTION, a very detailed reading of the document reveals no discriminatory statement. Key words from paragraph 1.c. are not even used, e.g., "retired military", "former military decision makers", "atheoretical" and "nonconceptual". There is not even a hint of discriminatory language in this Memorandum, which a 60 second scan will confirm.

• My resignation letter, Exhibit G, contains language from paragraph 1.c., and contains none of the language from the 13 October Memorandum.

• Dr. Smith or his Administrative Officer, Mrs. Martha Ann Elizondo will confirm that this document was not sent to Litton.

• Federal Acquisition Regulations prohibit information in the Memorandum from being provided to contract bidders.

• The ARI guidance to panel members (page B-6-18 of my claim) prohibit disclosure of this information to anyone outside the review panel.

• The Memorandum format was used for internal documents. If this had been intended for Litton it would have been a Letter.

• This Memorandum is from Dr. Smith, and he was prohibited from sending written documents directly to Litton.

• The Memorandum is addressed thru ARI Headquarters to DSSW, with no indication of a copy furnished to Litton.

• No person within the Government will claim that they sent this Memorandum to Litton and the Government can produce no evidence to suggest it was provided to Litton.

• My 21 May 1992 letter to DSSW, Exhibit F, is a request for the information contained in the 13 October Memorandum. If I had seen the Memorandum, it is not reasonable that I would have been requesting information which is contained in the Memorandum.

• As a related issue, the Memorandum is a forgery, because it does not include the names of those who developed paragraph 1.c., Dr. Jean Dyer and Ms. Marnie Salter.

• I saw the 13 October Memorandum for the first time on 1 June 1995.

The subject contract consists of about 1000 pages and there are at least 1000 pages of related documents, such as the 13 October Memorandum. Paragraph 1.c. is highly unique in that it contains discriminatory language which was motivated by personal prejudice. A very careful reading of the other 2000 pages associated with the contract reveals no other paragraph, sentence or word which is discriminatory in nature.

In view of the above, it seems reasonable that the false information provided to Judge Elliott concerning discriminatory language, most of page 3 of the MEMORANDUM AND ORDER ON DEFENDANT'S MOTION, should be revised and presented for reconsideration.

APPENDIX L

(EXCERPTS)

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

DENENDANT'S REPLY TO PLAINTIFF'S
RESPONSE TO MOTION TO DISMISS

July 3,1995

A careful reading of the plaintiff's response illustrates the confusion which the plaintiff brings to his action....

Plaintiff's allegations are confusing at best, because he alleges alternatively that (1) he resigned; (2) Litton terminated his employment; and (3) the Army caused the loss of his job....

The defendant fails to see anything more than a recital of plaintiff's confusion as to what really happened and he has failed to establish the elements of negligence to make out a prima facie case. Perhaps the plaintiff does not understand what really happened himself. The documents that the plaintiff has presented, on their face, do not show that the Army discriminated against the plaintiff.

APPENDIX M

(EXCERPTS)

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

June 19, 1995

COMES NOW, the Plaintiff, ART OSBORNE, by and through Counsel, and responds to the Motion to Dismiss filed by the Defendant...

...the Plaintiff shows that his claims are not barred by 1) the discretionary function exception (28 U.S.C. § 2680 (a)); 2) the interference with contract rights exception of FTCA (2680 U.S.C. § (h)); or 3) the federal Tort Claims Act two year statute of limitations...

Page 1-B of the contract provides as follows: "In addition, the contractor shall perform the work...

Contrary to the statement of the Government that the discriminatory paragraph cited in paragraph 11 of the Complaint was not included in the contract, the above quoted provision of the Litton contract incorporates by reference... the offensive paragraph...

Exhibit "B" attached to the Motion to Dismiss of the Government is a 13 October 1987 discussion of the strengths and weaknesses of four contractors; however, Plaintiff saw that document for the first time on 1 June 1995. (as an attachment to the Government's Motion to Dismiss). That document was never provided to Litton and the guidance to

panel members (middle of page B-6-18 of my claim) prevented this type of information from being disclosed to anyone who was not a member of the evaluation panel.

Plaintiff could not have referred to anything in that document because Plaintiff had never seen it.

The letter at Exhibit "C" was sent to Litton; however, it did not contain any scores, it did not contain any strengths, and it was not a follow-up letter....

STATEMENT OF MATERIAL FACTS TO WHICH
THERE IS A GENUINE ISSUE

The discriminatory paragraph 1-c (quoted in the original complaint in paragraph 11) is a part of the basic Litton contract. (See Government's Statement of Facts, as contrasted with Affidavit of Plaintiff filed in response to motion for summary judgment and Exhibits "A" and "D" to the Answer of the Government)....

Plaintiff did not refer to anything in the document attached to the government's Answer as Exhibit "B" dated 13 October 1987. Plaintiff had never seen that document....

The contract did not terminate of its own time expiration... The termination of the contract was not for the convenience of the Government...The letter dated 16 December 1992 attached as Exhibit "E" to the Government's Answer was never sent to Litton...The contract in question was closed on January 28, 1993; however. funding remained...

APPENDIX N

(EXCERPTS)

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

May 26, 1995

The United States of America, defendant in the above-styled action submits this memorandum in support of its motion.

I. INTRODUCTION

Pursuant to the federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq., plaintiff commenced this action against the United States on March 24, 1995, seeking money damages for the loss of his employment with Litton Computer Services (Litton), a defense contractor with the Army Research Institute (ARI) Field Unit at Fort Benning Georgia. Plaintiff alleges that due to negligent supervision by a government employee, Dr. Seward smith (Chief of the ARI), a discriminatory paragraph was allowed to be included in the contract entered into on January 28, 1988, between ARI and Litton.

Plaintiff further alleges that as a result of the discriminatory paragraph, the contract was closed on January 28, 1993, and ARI refused to allow a transfer of the contract and terminated subsquent funding for the contract. Plaintiff

claims that this caused him to suffer the loss of his job and salary from Litton.

It is the defendant's position that plaintiff's claims are barred by (1) the discretionary function exception (28 U.S.C. § 2680(a)); (2) the interference with contract rights exception to the FTCA (28 U.S.C. § 2680 (h)); and (3) the Federal Tort Claims Act two year statute of limitations.

II. STATEMENT OF FACTS

Plaintiff was employed as Project Manager of the contractor, Litton, from July 10, 1978 through January 28, 1993....
This contract, by its own terms and pursuant to federal regulations, was contingent upon funding and by ARI's requirement for the services. The provisions and conditions of the contract were controlled by the Federal Acquisition Regulations (48 C.F.R. §§ 1-52) and incorporated by specific reference, 48 CFR § 52.249.6, which authorizes the government to terminate the contract if the contracting officer determines that termination is in the government's interest.1

1 This contract is completely devoid of any "discriminatory" language which would support plaintiff's allegations. The language he relies upon actually appears in an evaluation letter of which plaintiff was not a party, and which pre-dates the actual Litton contract. It amounts to no more than an assessment of the various bidders to ARI, of which Litton was one. The language of that letter is totally extraneous to the ultimate contract provisions, and cannot be the basis of any claim by plaintiff.

Thereafter, ARI notified Litton by letter on December 16, 1992, that it recommended that action be taken to terminate the Contract. ARI explained that funding had been reduced for fiscal years 90-96 due to ARI budget decreases and stated that the termination was for the convenience of the government (Exh. E). Although ARI recommended termination of the contract, the term of the contract was for a period of five (5) years and it expired in accordance with its terms on January 28, 1993, without the necessity of formal termination by the government. Litton agreed that the contract ended in accordance with its terms (Exh. H).

III. ARGUMENT

The Federal Tort Claims Act... The Act contains several express exceptions which were designed explicitly to preserve immunity as to certain claims (28 U.S.C. § 2680). A claim which falls within the purview of an exception to the waiver is barred for lack of subject matter jurisdiction. Payne v. United States, 730 F.2d 1434 (11th Cir. 1984).

The plaintiff's claim in the present case is barred by the discretionary function exception as set forth in 28 U.S.C. § 2680(a) because it is based on a purely administrative decision in evaluating the strengths and weaknesses of the bidders for the contract with ARI to determine which bid was the most advantageous to ARI... the contract was solely between Litton and ARI. The plaintiff implies throughout his complaint that he was injured by discriminatory language relevant to the contract....

The discretionary function exception excludes any tort claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

DEFENDANT'S MOTION TO DISMISS, May 26 1995
(EXCERPTS FROM EXHIBIT A)

CONTRACT MDA903-88-C-0407, January 28, 1988

3. Article C-1, Scope of Work, is modified to read as follows:
The contractor shall furnish the necessary personnel, materials, facilities; and other services as may be required to perform the work set fourth herein and in the Statement of Work as set forth in Attachment #1.
In addition, the contractor shall perform the work in accordance with Litton's initial Technical proposal submission entitled Developing Training and Systems Solutions for Combat Critical Tasks, #PSA-87/018; dated 23 September 1987; Litton's Technical Resubmission, #PSA-87/018R1, dated 4 November 1987; and Litton's Best and Final Offer, #PSA-87-018R2, dated 18 December 1987; which are hereby incorporated by reference with the same force and effect as if set forth completely herein....

6. Article G-3, Contracting officer's representative (COR), is modified...as shown below:

Dr. Seward Smith (Primary COR), Dr. Thomas J. Thompson (Alternate COR, Task 1), Dr. Pamela M. Terry (Alternate COR, Task 2), Dr. Jean L. Dyer (Alternate COR, Task 3), Ms. Margaret S. Salter (Alternate COR, Task 4)

DEFENDANT'S MOTION TO DISMISS, May 26 1995
(EXCERPTS FROM EXHIBIT B)

U.S. ARMY RESEARCH INSTITUTE
FORT BENNING FIELD UNIT
FORT BENNING, GEORGIA

PERI-IJ

13 October 1987

Memorandum Thru: Director, Training Research Laboratory, U.S. Army Research Institute…Alexandira, Virginia

For: Deputy Director for Acquisition, Defense Supply Service-Washington… The Pentagon, Washington, DC

Subject: Technical Evaluations of Proposals Submitted in Response to Solicitation MDA903-87-R-0107, Developing Training and Systems Solutions for Combat-Critical Tasks

1. The technical proposals submitted in response to subject solicitation have been reviewed and technically evaluated by the following named panel members…: Dr. Seward Smith…Dr Thomas J. Thompson…Dr. Pamela M. Terry…Dr David W. Bessemer…Dr. James L. Fobes…Mr. Jan Chervenak

2. The evaluation criteria, with weights, were previously provided… In performing independent formal evaluation of the proposals from a technical and scientific viewpoint, the panel members developed both numerical ratings and rankings and narrative data on specific strengths and weaknesses of the proposals…

3. Four proposals were received and evaluated. None was found to be clearly superior, and in fact, all contained deficiencies serious enough to result in relatively low point totals. Litton Computer Services ranked first, receiving an average total score of 61.3 (out of a possible 100); the BDM Corporation was second, averaging 49.0; Applied Science Associates, Inc. (ASA) was third with 48.9; and Control Data Corporation (CDC) was a distant fourth with only 18.9 points.

4. CDC was judged to be unsuitable...

5. The rating panel...has prepared general declarations and questions (see Encl 3) that Litton, ASA and BDM should be requested to address. A brief summary of the strength and weaknesses of the proposals submitted by each of these firms follows.

6. Litton Computer Services was ranked either first or second by all six evaluators, although they were judged to need considerable improvement in all three rating areas (personnel, technical, and corporate). Litton received the highest total of all bidders for personnel (24.1 of 40). This comes in part because they proposed a full and fully documented staff, but there were deficiencies noted. One of their strength is their considerable, relevant, direct experience in several of the research areas. A weakness is lack of senior scientific talent and a tendency to rely too much on prior military researchers who possess limited scientific credentials. Litton scored 31.1 of 50, tops on technical excellence. Strength were broad, relevant knowledge of the research areas, relevance of research previously conducted, and products previously generated. Weaknesses were lack of creative, innovative, future plans

and limited knowledge and plans in some of the new research areas. They scored 6.2 of 10 in corporate capability (below the top ranked firm which scored 7.3). Strengths are a history of a good working relationship with ARI in many areas, but weaknesses are effectiveness of parts of project management and some deficiencies in prior corporate backup to the Litton team. Overall, Litton ought to be able to perform most of the work reasonably well, but considerable improvement should be made.

7. The BDM Corporation was ranked second with 49.0 points. They were somewhat ahead of Litton in corporate capability (7.3), a little behind Litton in technical (30.5), but were very much lower than other contenders in personnel (11.2)....

8. ASA finished third with an average of 48.9 points, only .1 points behind BDM. They too had deficiencies in all areas...

5 Encl
1. Scoreing Criteria
2. Numerical Eval Summary
3. Questions to Offerors
4. Non-Disclosure Certif
5. Financial Interest Stmnt

DEFENDANT'S MOTION TO DISMISS, May 26 1995
(EXCERPTS FROM EXHIBIT C)

DEPARTMENT OF THE ARMY
DEFENSE SUPPLY SERVICE SERVICE-WASHINGTON
WASHINGTON,DC 20310

ACQUISITION DIRECTORATE 20 October 1987

Litton Computer Services
Attn: Mr. Robert Shafer
1300 Villa Street
Mountain View, CA 94039

Dear Mr. Shafer:

Reference: Solicitation No. MDA903-87-R-0107, "Developing Training and Systems Solutions for Combat Critical Tasks." (PSA-87-018)

1. This letter hereby confirms the telephone conversation on 20 October 1987 between Alyssa Murray, DSS-W, and Mr. Robert Shafer, Litton Computer Services, concerning the above referenced RFP.

2. Attachment #1 to this letter contains Discussion issues to be responded to in writing…

_____
Edna Clark
Contracting Officer

1 attachment
as stated (10 pages)

(First page of Attachment -- October 20, 1987 letter from Defense Supply Service-Washington to Litton)

LITTON COMPUTER SERVICES

1. GENERAL COMMENTS AND QUESTIONS

a. In preparing your response...

b. ARI-Benning needs contractor assistance/backup in many areas of general operations...

c. There has been a failure to understand critical staffing requirements and respond to them, such as the need for skilled senior scientists in all task areas. A fundamental problem with Litton's overall approach is the historical attitude that retired military personnel or junior scientists are capable of performing, and should lead, scientific research. This is evidenced by the local staffing structure which has two levels of former military decision makers before a scientist appears in two of the proposed tasks. It should be noted that the scientists who are then found are relatively junior and have little experience and recently acquired skills. In addition, the junior level scientist structure with retired military in the lead is reflected in the atheoretical and nonconceptual approach to all of the tasks.

d. ...evaluate your overall management plan in light of subparagraph 1c above...

DEFENDANT'S MOTION TO DISMISS, May 26 1995
(EXCERPTS FROM EXHIBIT D)

PSA-87/018R1
4 November 1987

DEVELOPING TRAINING
AND SYSTEMS SOLUTIONS
FOR COMBAT-CRITICAL TASKS

TECHNICAL RESUBMISSION

BY: Litton Computer Services

GOVERNMENT COMMENT 1c

There has been a failure to understand critical staffing requirements and respond to them, such as the need for skilled senior scientists in all task areas. A fundamental problem with Litton's overall approach is the historical attitude that retired military personnel or junior scientists are capable of performing, and should lead, scientific research. This is evidenced by the local staffing structure which has two levels of former military decision makers before a scientist appears in two of the proposed tasks. It should be noted that the scientists who are then found are relatively junior and have little experience and recently acquired skills. In addition, the junior level scientist structure with retired military in the lead is reflected in the atheoretical and nonconceptual approach to all of the tasks.

DEFENDANT'S MOTION TO DISMISS, May 26 1995
(EXCERPTS FROM EXHIBIT E)

PERI-IJ

16 December 1992

MEMORANDUM THRU: Acting Director, U.S. Army Research Institute...Alexandra, Virginia

FOR: Deputy Director for Acquisition, Defense Supply Service-Washington, The Pentagon

SUBJECT: Request for Termination of contract MDA903-88-0407 - Developing Training and Systems Solutions for Combat-Critical Tasks

1. It is recommended that action be taken to terminate Contract MDA903-88-C-0407.... for the convenience of the Government....

3. Reductions in ... ARI ... budget for Ficsal Years 90 through 96 have impacted heavily upon the research program...

(no signature)
SEWARD SMITH
Chief, ARI-Fort Benning Field Unit
Contracting Officer's Representative

DEFENDANT'S MOTION TO DISMISS, May 26 1995
(EXCERPTS FROM EXHIBIT F)

ART OSBORNE
3650 DENEWOOD CT
COLUMBUS, GA 31909
706/563-3674

21 May 1992

Defense Supply Service-Washington
Attn: TOM BUSHNELL
Room 1D-245, The Pentagon
Washington, DC 20310-5220

Subject: Request for Information

1. The enclosed letter to Clara Migdalski is a request which Dr. Smith discussed with you yesterday. You can help me by getting this to the right place -- and I wanted to provide you some explanation.

2. Four years ago I had a problem with the statement that retired military personnel are not capable of conducting or leading research. I put that aside when the contract was awarded. However, in recent months I have become convinced that the ARI staff members who believe that retired military personnel should not participate in military research have failed to support Seward and they have had a negative influence on funding of the Benning contract. I plan to challenge their current prejudice, and the 1987 comments are relevant. Note that this is an individual action, with no Litton involvement.

DEFENDANT'S MOTION TO DISMISS, May 26 1995
(EXCERPTS FROM EXHIBIT G)

LITTON
COMPUTER SERVICES 22 October 1987

MEMORANDUM FOR: JERRY SANFORD

SUBJECT: RESIGNATION

1. This is an offer of my resignation as the Fort Benning Program Manager and/or from Litton Computer services, to be effective on a date of your choosing.

2. The ARI comments on our proposal, received yesterday, stated very clearly that due to my status as retired military and a former military decision maker, I am not capable of performing scientific research or leading scientific research.

4. Assuming that my ten years of dedicated and productive scientific research, in association with Dr. Smith, will…

5. I believe our strongest position is to leave me as Program Manager…

6. I want to be Litton's Program Manager…

Art Osborne
Program Manager

CF: Dr. Seward Smith

APPENDIX O

(EXCERPTS)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ART OSBORNE — FILE NO. 95-37-COL

PLAINTIFF

VS. — CIVIL ACTION

UNITED STATES OF AMERICA — FILED AT 4:40 PM MAR 24 1995

DEFENDANT

COMPLAINT

COMES NOW, ART OSBORNE, Plaintiff named above and makes the following Complaint against the defendant ....

5.

The plaintiff filed a claim for damages in accordance with 28 U.S.C. § 2675 (a) on September 12 1994, said claim being filed at the Office of the Secretary of Defense, Pentagon, Washington, D.C. See Plaintiff's Exhibit "I", with tabs A through G-2 attached hereto and by reference made a part hereof.....

11.

The contract was closed and not funded solely due to negligence of the Chief, ARI-Benning, Dr. Seward Smith, in his supervision of subordinates. This negligence consisted of the failure of Dr. smith to act with due care in such supervision, specifically in allowing the requirements of a paragraph to be required in the solicitation of Litton Computer Services, to-wit:

"c. There has been a failure to understand critical staffing requirements and respond to them, such as the need for skilled senior scientists in all task areas. A fundamental problem with Litton's overall approach is the historical attitude that retired military personnel or junior scientists are capable of performing, and should lead, scientific research. This is evidenced by the local staffing structure which has two levels of former military decision makers before a scientist appears in two of the proposed tasks. It should be noted that the scientists who are then found are relatively junior and have little experience and recently acquired skills. In addition, the junior level scientist structure with retired military in the lead is reflected in the atheoretical and nonconceptual approach to all of the tasks."

(Excerpts from Tort Claim document)

The genesis of this claim is paragraph 1.c. of the initial review of the contract proposal...This paragraph was sent to my employer (Litton)...Paragraph 1.c. informed my employer that retired military personnel are incapable of performing or leading research and that they are incapable of taking a conceptual or theoretical approach to research issues. While this statement is true for many retired military personnel, it does not apply to all retired military personnel and it does not

apply to me. Paragraph 1.c... represents a violation of Federal employment laws and the people who wrote it should not have been allowed to control contract awards or funding.... Does paragraph 1.c. reflect prejudice?...Does 1.c. reflect a violation of Federal employment laws?... Was I subject to adverse treatment as a result of the prejudice stated in 1.c. and my protest of the prejudice?... Is there a direct cause-and-effect relationship between paragraph 1.c. and my protest of the prejudice?

(Excerpts from Tab A of the Tort Claim)

The initial ARI review of our proposal stated that retired military personnel are not capable of performing or leading military research.... The review, which became a formal part of our contract, states that "a fundamental problem with Litton's overall approach is the historical attitude that retired military personnel or junior scientist are capable of performing, and should lead, scientific research.... two levels of former military decision makers...retired military in the lead is reflected in the atheotetical and nonconceptual approach to all of the tasks." What did the ARI panel say? They reflected preconceived unfavorable feelings for all retired military personnel and included opinions without thought or reason. It is called prejudice. They made a distinction against retired military personnel on a categorical basis rather than according to actual merit. It is called discrimination. The statements would be no more discriminatory if they had stated that African Americans of females are not capable of conducting research. The term "retired" is negative for someone looking for real work, and "decision maker" suggest that one may be capable of making military decisions but not capable of deriving scientific findings from analyses of research data. Therefore, when

applying for a scientific research job, "retired decision maker" is a negative way of referring to veterans. If we accept the notion that a retired military person has undergone permanent cogitative degradation which renders one incompetent to participate in military research, it is not reasonable to assume this condition occurs suddenly on the day of retirement. Therefore, we must conclude that this condition is present in all senior military personnel. The purpose of this contract was not to conduce basic research to develop a cure for cancer, but to conduct applied research directed at solutions for Infantry combat tasks. Without my 20 years of Army service, which included two years of Infantry combat, my scientific education and scientific work experience qualified me for this position. Why did the Panel consider knowledge and experience in the area under research to be a dis-qualifier?...